No. 14-144

Supreme Court, U.S.
FILED
FEB 17 2015
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JOHN WALKER III, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE BOARD, ET AL.,

Petitioners,

v.

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS INC., ET AL.,

Respondents.

On a Writ of Certiorari to the United States Court Of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* CATO INSTITUTE, P.J. O'ROURKE, NAT HENTOFF, MARTIN GARBUS, NADINE STROSSEN, AND THE COMIC BOOK LEGAL DEFENSE FUND, IN SUPPORT OF RESPONDENTS

ROBERT CORN-REVERE
Davis Wright Tremaine LLP
1919 Penn. Ave., NW
Suite 800
Washington, DC 20006
(202) 973-4200
bobcornrevere@dwt.com

Counsel for Amicus *CBLDF*

ILYA SHAPIRO
Counsel of Record
Cato Institute
1000 Mass. Ave. NW
Washington, DC 20001
(202) 842-2000
ishapiro@cato.org

Counsel for Amici Curiae

QUESTION PRESENTED

Can the government censor speech based on the belief that someone "might be" offended?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 5

ARGUMENT:
THIS COURT SHOULD CONTINUE TO PROTECT OFFENSIVE SPEECH 12

I. OFFENSIVE SPEECH CONTRIBUTES TO THE MARKETPLACE OF IDEAS 12

II. OFFENSIVE SPEECH FOSTERS SELF-EXPRESSION AND HELPS DEVELOP PERSONAL AUTONOMY 19

III. OFFENSIVE SPEECH IS UNDER ATTACK 23

A. Offensive Speech Is Under Attack Throughout the Western World 23

B. Offensive Speech Is Under Attack on College Campuses 27

CONCLUSION 31

TABLE OF AUTHORITIES

Page(s)

Cases

Abrams v. United States,
250 U.S. 616 (1919).....11, 12

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478 U.S. 675 (1986)..... 13-14

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INTEREST OF *AMICI CURIAE*[1]

Amici are organizations and individuals who are deeply implicated in the fight to protect the freedom of speech in all its guises.

The Cato Institute is a non-partisan public policy research foundation that was established in 1977 to advance the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*. Cato is committed to preserving the freedom of expression and making people uncomfortable about their policy positions.

P.J. O'Rourke is one of America's leading political satirists, an H.L. Mencken Research Fellow at the Cato Institute, and an equal-opportunity offender. Formerly the editor of the *National Lampoon*, he has written for such offensive publications as *Car and Driver*, *Playboy*, *Esquire*, *Vanity Fair*, *House & Garden*, *The New Republic*, *The New York Times Book Review*, *Parade*, *Harper's*, and *Rolling Stone*. He is now a contributing editor at *The Atlantic* and *The Weekly Standard*—which tend to offend each others' readers—and a member of the editorial board of *World Affairs*. O'Rourke's books have been

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[1] Pursuant to this Court's Rule 37.3(a), both parties have consented to the filing this brief. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* made a monetary contribution to its preparation or submission.

translated into a dozen languages and are worldwide bestsellers. Three have been *New York Times* bestsellers: *Parliament of Whores*, *Give War a Chance*, and *All the Trouble in the World*. He is also the author of *Eat the Rich*, *Peace Kills*, and *Don't Vote: It Just Encourages the Bastards*.

Nat Hentoff is one of the foremost authorities on and practitioners of the First Amendment. While his books and articles regularly defend the rights of Americans to think and speak freely, he also protects our freedoms by showing how Supreme Court and local legislative decisions affect the lives of ordinary Americans. Hentoff's column, "Sweet Land of Liberty," has been distributed by the United Feature Syndicate since 1992. In 1995, he received the National Press Foundation Award for Distinguished Contributions to Journalism and, in 1999, he was a Pulitzer finalist for commentary. Hentoff was a columnist and staff writer with *The Village Voice* for 51 years, and also writes on music for *Wall Street Journal* and *Jazz Times*. He serves on the board of advisors of the Foundation for Individual Rights in Education (FIRE) and is on the steering committee of the Reporters' Committee for the Freedom of the Press. He was awarded an honorary doctorate of law from Northeastern University in 1985.

Martin Garbus, one of America's leading First Amendment lawyers, represented Lenny Bruce as well as other clients with offensive speech issues, including before the U.S. Supreme Court. He is the author of five books on constitutional law and free speech, including *Courting Disaster*, *Tough Talk: How I Fought For Writers, Comics, Bigots, and the American Way* and *The Next 25 Years: How The*

Supreme Court Will Make You Forget the Meaning of Words Like Privacy, Equality and Freedom. Garbus is the recipient of numerous awards, including a Fulbright Award, a PEN USA First Amendment Award of Honor, and the James Joyce Award from the Literary and Historical Society, University College Dublin.

Nadine Strossen holds the John Marshall Harlan II Chair at New York Law School, was president of the American Civil Liberties Union from 1991 through 2008, and continues to serve on the ACLU's National Advisory Council. She also holds leadership positions in other organizations that focus on free speech issues, including FIRE. Strossen's extensive writings that defend freedom for offensive expression include her book, *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights* (Scribner 1995) and her co-authored book, *Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights, and Civil Liberties* (NYU Press 1994). Her ideas on this and other topics have many times been deemed sufficiently offensive to trigger boycotts, dis-invitations, and picketing, as well as death threats. To cite one memorable example, on April 12, 2005, while attempting to speak at an event honoring Justice Antonin Scalia, she was shouted down by protestors who were offended by some of his opinions and her participation in the event.[2] Ironically, some of these protesters engaged in offensive expression themselves, without Justice Scalia or anyone else trying to suppress it. Strossen is proud to occupy a

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[2] *See, e.g.*, Petrox, *Scalia at NYU Law: When Libs and Free Speech Implode*, DailyKos, Apr. 12, 2005, http://goo.gl/ouGLsZ.

chair named after the justice who authored *Cohen v. California*, which upheld the right to engage in offensive expression, recognizing that this is "powerful medicine in a society as diverse...as ours" but explaining that "no other approach would comport with the premise of individual dignity and choice upon which our political system rests."

The Comic Book Legal Defense Fund is a non-profit organization dedicated to the protection of the First Amendment rights of the comics art form and its community of retailers, creators, publishers, librarians and readers. With a membership that includes comic book creators, publishers, retailers, and aficionados, the CBLDF has defended dozens of First Amendment cases in courts across the United States, and led important education initiatives promoting comics literacy and free expression.

This case concerns *amici* because someone is offended by nearly everything they do in their personal and professional lives. They would hate to have any government judge their propriety.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Between 1861 and 1865, Texas was in a state of rebellion, waging war against the United States under the flag of the Confederacy. Texas has never offered any indication that it is ashamed of this history. Indeed, the state recognizes April as Confederate History Month, and spends January 19 celebrating Confederate Heroes Day. Monuments commemorating the ~~Civil War~~ War of Northern Aggression can be found deep in the heart of the Lone Star State.

Yet to coddle the sensitivities of its citizens, Texas would spare them in one context the sight of the very flag it otherwise venerates (among other "offensive" sights): it has empowered the state Department of Motor Vehicles to prevent people from being offended by license plates. (Not *all* people, mind you; that would be too high a bar, even if the DMV knows better than anyone exactly what it takes to be universally offensive.) When the DMV determined that *some* people would be offended by a specialty plate that features the Confederate battle flag—hard to dispute that claim—that was all that was required under the relevant statute to ban such expression. To wit, the Board can "refuse to create a new specialty license plate if the design *might be offensive to any member of the public*." Tex. Transp. Code Ann. § 504.801(c) (emphasis added).

If this were simply another instance of governmental hypocrisy, we would not be here. There's no constitutional provision forbidding hypocrisy, which Americans have come to expect from government officials. But Texas's actions were

more than merely hypocritical. They violated the basic constitutional principle—one that Texas had to reaffirm when it was readmitted to the Union—that a state cannot protect the sensibilities of some by restricting others' freedom to speak.

Moreover, the DMV seems to pursue its mission—the righteous task of ensuring that not even one motorist has to endure half a second of micro-aggression before he reaches down to change the radio—in a half-hearted way. After all, take a look at the plate designs it has let slip by its censorious filter. Texas DMV, *Specialty License Plates*, http://txdmv.gov/motorists/license-plates/specialty-license-plates (last visited Feb. 16, 2015).

The "Boy Scouts" specialty plate no doubt ruffles the feathers of those who consider that group to be a retrograde anti-gay menace (and also those who cannot abide children in uniforms). The "Choose Life" plate similarly raises the hackles of those who think that its message subtly slanders women who might choose to have an abortion. What about "Come and Take It" (accompanied by a picture of a cannon) or "Desert Storm" or "Fight Terrorism"? Forget viewpoint discrimination; these sorts of messages would insult pacifists and those who disagree with American foreign policy even if "Turn the Other Cheek" or "Al Qaeda Forever" tags were available. "Mighty Fine Burger" and "Dr. Pepper" surely offend Michael Bloomberg's acolytes, not to mention fans of McDonalds and Pepsi. Many Apache, Comanche, or Kiowa would take offense at a good ol' boy driving around with a "Native Texan" plate. And would not an animal-rights supporter who volunteers for PETA have a (soy) beef with the "Texas Trophy Hunters

Association" plate. Finally, any true Texan would find the "University of Oklahoma" plate to be beyond the pale of *any* standard of human decency.[3]

Such is the problem with trying to eradicate offensive speech: everything offends someone. Texas's attempt to solve this problem is quixotic at best and unconstitutional at worst. Yet Texas's law is not just unconstitutional, it is unwise. In a free society, offensive speech should not just be tolerated, its regular presence should be celebrated as a symbol of democratic health—however odorous the products of a democracy may be.

In the past, *amicus* P.J. O'Rourke has been particularly offensive to this brief's counsel of record, who is Canadian. In an early issue of *National Lampoon*, O'Rourke wrote an extremely insensitive article, *Foreigners of the World: A Brief Survey of the Various Foreign Types, Their Chief Characteristics, Customs, and Manners*, Nat'l Lampoon, May 1976, at 59. O'Rourke described Canucks thus, in what was (fittingly) the mildest part of the piece:

> Hard to tell a Canadian from an extremely boring regular white person unless he's dressed to go outdoors. Very little is known of the Canadian country since it is rarely visited by anyone but the Queen and illiterate sport fishermen. It is thought to resemble a sort of

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[3] One research fellow at *amicus* Cato is a die-hard Sooners fan. While he appreciates the OU tag, he is offended by the very existence of Texas and respectfully suggests that, as an alternative way to dispose of this case, this Court could rule that Texas is unconstitutional. Or, better yet, make it part of Oklahoma. That would really help with recruiting.

> arctic Nebraska. It's reported that Canadians keep pet French people. If true, this is their only interesting trait. At any rate, they are apparently able to train Frenchmen to play hockey, which is more than any European has ever been able to do.

Id.[4] Of course, there's only so much you can say about the most innocuous country on earth, so O'Rourke also went after Africans, Arabs, Chinese, Indians, Mexicans, and others in the most innovatively stereotypical way possible.[5]

Not bad, we guess, for someone from Ohio, a state that not only doesn't reach Michigan's level of cultural significance, but has a stunningly high ratio of people (12 million) to places of interest (11—or 12 if you count Cincinnati's American Sign Museum, which we don't). Ohio is so backward that it even tried to criminalize making "false statements" about political candidates. We're happy that this Court found that offensive (or at least that others had

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[4] Counsel Shapiro notes that to the extent this uncouth satire carries any grain of truth, he has tried to improve himself by also becoming American. After navigating the offense to reason that is the immigration system, Shapiro became a U.S. citizen last year. Like most immigrants, he does a job most Americans shy away from: defending the Constitution.

[5] *Amici* could very easily include here some offensive lines aimed at the Court, targeting justices' ethnicities, geographical origins, and gender, let alone their jurisprudence. We refrain from doing so not because we lack the right to do so—or even because it wouldn't further illustrate the thrust of our argument—but because part of what makes "offensive" speech valuable is the ability to employ (or not employ) it strategically.

standing to plead constitutional offense). *Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334 (2014).

In any event, offensive speech is unquestionably protected by the First Amendment. *See, e.g., Street v. New York*, 394 U.S. 576, 592 (1969) ("It is firmly settled that the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). Yet too often offensive speech seems to be protected begrudgingly, perhaps because it is difficult to draw a line between offensive and inoffensive speech—implying that if such a line could be drawn, *then* banning offensive speech might be desirable. Or its protection comes with an apology, a reluctance to fully commit First Amendment protections to the most boorish and crass among us.

Well, the boorish and crass are now before this Court to ask that their contributions be recognized. Offensive speech should not just be considered incidentally protected, but inherently valuable to a free society. Fifty-four years after Lenny Bruce—the comedian perhaps best known for pushing the envelope of propriety—was arrested onstage at the Jazz Workshop in San Francisco, offensive speech still needs protection. And a case concerning a specialty license plate that is admittedly odious to some is the perfect vehicle, as it were, to use in a defense of offensive speech. After all, it is axiomatic that the First Amendment exists to protect

unpopular, unusual, and controversial expression. Moreover, the protections traditionally offered to offensive speech are being slowly and dangerously eroded. The law challenged here imbues the DMV with stunning discretion, and it exemplifies how our increasing cultural timidity—a personal-political correctness—is turning into a frightening movement to suppress and eliminate "offensive" speech.

We particularly see this skittishness on college campuses—many of which are government-run—where the reigning belief is now that if someone is offended, then someone else must be guilty of something. *See generally* Greg Lukianoff, *Unlearning Liberty: Campus Censorship and the End of American Debate* (2012). We also see it in the speech laws that are creeping across Europe, criminalizing everything from racist tweets to asking a police officer, "is your horse gay?" John O'Sullivan, *No Offense: The New Threats to Free Speech*, Wall St. J., Oct. 31, 2014, http://goo.gl/GfdcXb. And we see it when the residents of a Massachusetts town, perhaps trying to recapture their Puritan roots, imposed a $20 fine for public profanity. Editorial, *First Amendment Be Damned*, N.Y. Times, June 17, 2012, http://goo.gl/Zt2J2i.[6]

Fortunately, this Court is one of free expression's greatest champions. Time and again, it has reminded people all over the world what a true commitment to the freedom of speech looks like. Alas it is a lesson

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[6] As far as treatment of bad behavior goes, *amici* prefer the subtle social pressures of the fictional Stars Hollow, Connecticut, *see generally Gilmore Girls* (Warner Bros. 2000-2007), to those heavy-handed tin-ears of Middleborough, Mass.

that needs constant repetition as would-be censors raise new arguments in old wineskins. It is time for this Court to assert that offensive speech is not just tolerated in free society, it is welcome.

Offensive speech is valuable for two main reasons. First, it contributes to the marketplace of ideas. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market"). It helps establish the parameters for public discourse, and in so doing expands what can be acceptably discussed.

Second, the right to speak or behave offensively is an essential aspect of personal autonomy. Offending prevailing mores and values is as crucial to defining oneself as supporting them is. A bottled-up offensive person is as uncomfortable as a Victorian at a punk concert—and both need each other for definition. By offending, a person stakes a claim to an identity that is crucial to her development as a human being. The government has no role in constraining that development within the boundaries delineated by the Texas DMV Board or any other government entity.

Now, *amici* take no position on whether state-issued specialty license plates qualify as government speech or whether there is a "quasi-public forum" here—or any other brand of legal artifice. Nor do we take issue with reasonable time, place, and manner restrictions on offensive speech (or other kinds of protected speech). Still, if this Court rules that specialty plates constitute private speech, *amici* do contest the Texas DMV's mission to eradicate speech that "might be offensive to any member of the

public." *Amici* are, well, offended by both the breadth of the Texas statute and the insouciance it shows toward the role that offensive speech plays in society.

A law explicitly banning "political speech" would receive no quarter from any federal court—battles over campaign-finance laws aside—and it is time that offensive speech receive the same protection, particularly at a time when foreign laws prohibiting offensive speech lap against our shores and speech codes threaten to spill over from our campuses. A free society should not walk on eggshells, it should sleep on nails. Freedom produces barbs, points, and rough edges, and any attempt to sand those down will not only result in less freedom, it will create a less interesting, dynamic, and robust society.

ARGUMENT: THIS COURT SHOULD CONTINUE TO PROTECT OFFENSIVE SPEECH

I. OFFENSIVE SPEECH CONTRIBUTES TO THE MARKETPLACE OF IDEAS

The borderlands of the marketplace of ideas are inhabited by ideas that unsettle and offend. Only those ideas that people are allowed to express can be freely traded, so a "free trade in ideas" cannot exist when some ideas are relegated to the black market. *Abrams*, 250 U.S. at 630. Indeed, because offensive speech changes the parameters of the marketplace, it is as vital to the exchange of ideas as so-called mainstream speech. Without expanding the borders of the marketplace, a society may stagnate. If no one ever offensively says "the Emperor has no clothes" then a society may be condemned to dynasties of naked emperors, and *that* would be truly offensive.

In *Whitney v. California*, Justice Brandeis observed that, at one time, "[m]en feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears." 274 U.S. 357, 376 (1927) (Brandeis, J., concurring). This is certainly true, but before scientists and thinkers could show that there are not in fact witches, someone needed to offend, to create room for inquiry through mockery, crudeness, and ribaldry. In fact:

> Everything we know about the world—the age of our civilization, species, planet, and universe; the stuff we're made of; the laws that govern matter and energy; the workings of the body and brain—came as insults to the sacred dogma of the day. We now know that the beloved convictions of every time and culture may be decisively falsified, doubtless including some we hold today.

Steven Pinker, *No Free Speech Means No Freedom: There Is No Real Democracy Without Debate, Satire, and Discussion*, Boston Globe, Jan. 27, 2015, at A11.

What was once offensive will often become mainstream, sometimes because a previously obnoxious opinion is now accepted as fact, sometimes because a previously repulsive word becomes commonplace. In *Bethel School District*, Justice Stevens began his dissent by recalling a classic case of offensiveness:

> "Frankly, my dear, I don't give a damn."
>
> When I was a high school student, the use of those words in a public forum shocked the Nation. Today Clark Gable's four-letter expletive is less offensive than it was then.

Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 691 (1986) (Stevens, J., dissenting).

That "damn" would be considered offensive seems almost silly today, and surely some of what is offensive today will seem innocuous in the future—but only if offensive speech continues to be freely traded. This evolution of expression not only speaks to the ability of offensive speech to change the parameters of the marketplace of ideas, it underscores the indomitability of the offensive person who, like water, will always find a way.

There is no end-point to offensiveness, just the latest iteration. In 2012's blockbuster hit *The Avengers*, the villain calls a protagonist a "mewling quim." *The Avengers* (Marvel Studios 2012). While the insult would have "drawn audible gasps" from 19th century Londoners, modern crowds hardly noticed. Matthew J.X. Malady, *No Offense: Profanity is Changing. For the Better*, Slate.com, July 1, 2013, http://goo.gl/CxU8v9; see also Christopher M. Fairman, *Fuck: Word Taboo and Protecting Our First Amendment Liberties* 31-53 (2009).

Yet even the progression of profanity can help shape the world around us for the better. Changing concepts of vulgarity help remove taboos, and when taboos are removed the conversation can change direction, often for the better.

The field of sex research, for example, has been historically hindered by the influence of taboos. According to famed sex researches William Masters and Virginia Johnson, sex research in the late 1950s was "governed by fear—fear of public opinion fear of religious intolerance, fear of political pressure, and, above all, fear of bigotry and prejudice—as

much within as without the professional world." Mary Roach, *Bonk: The Curious Coupling of Science and Sex* 11 (2008).

As a result of those taboos, scientific research into one of the most basic and necessary components of human life was retarded and millions of people with sexual dysfunctions—from infertility to impotence—were worse off. Victorian physicians "even practiced gynecology and urology on women *without looking*." *Id.* at 13. Early scientists tried to focus their studies on fertility, obstetrics, gynecology, and venereal disease, yet even those scientists became the victims of rigid and unchallenged taboos.

> Gynecologist James Platt White was expelled from the American Medical Association in 1851 after inviting medical students to observe a (consenting) woman in labor and delivery. His colleagues had been outraged over the impropriety of a male doctor looking at female genitalia. In 1875, a gynecologist named Emo Nograth was booed while delivering a talk on venereal disease at the newly formed American Gynecological Society. The sex researcher and historian Vern Bullough, in the 1970s, landed on an FBI list of dangerous Americans for his "subversive activities" (e.g. publishing scholarly papers about prostitution and working for the American Civil Liberties Union to decriminalize, among other things, oral sex and the wearing of dresses by men).

Id. at 13-14.

Some researchers, like John B. Watson, helped push taboos away because sex "is admittedly the

thing that causes the most shipwrecks in the happiness of men and women. And yet our scientific information is so meager." *Id.* at 26. Even though intrepid sex researchers like Masters and Johnson helped break down these walls, scientists—as a whole—are not known for flaunting conventional taboos, particularly when grants and funding are on the line. Instead, our conversations on sex—and consequently our knowledge of the science of sex—were changed by the commentators and comedians who push taboos not just to be funny, but to deconstruct societal hang-ups.

When Lenny Bruce was arrested at San Francisco's Jazz Workshop in October 1961, the arresting officer told him that he "took offense" at Bruce's act because he couldn't see "any right, any way you can break this word down [the word Bruce used was "cocksucker"], our society is not geared to it." Ronald K.L. Collins & David M. Skover, *The Trials of Lenny Bruce: The Rise and Fall of an American Icon* (2002). Bruce responded "You break it down by talking about it." *Id.*

When Bruce performed, "[p]eople couldn't believe their ears. He gave public voice to their most guarded thoughts about religion prejudice, sex, and violence. He violated taboos with murderous impunity." *Id.* Yet Bruce's impertinence served a purpose. Said Ralph Gleason, a cultural critic and witness at Bruce's trial, "The theme of the performance on the night in question was a social criticism of stereotypes and of the hypocrisy of contemporary society." *Id.* Another witness, *amicus* Nat Hentoff, remarked that "it is in Lenny Bruce—and only in him—that there has emerged a

cohesively 'new' comedy of nakedly honest moral rage at the deceptions all down the line in our society. Coursing through everything he does, however, is a serious search for values that are more than security blankets." *Id.*

Offensive people like Bruce break down the walls between the sacred and the profane, walls that sometimes need to be destroyed. Bruce "reminds us why humor is no laughing matter—why satire and ridicule, even when puerile and tasteless, are terrifying to autocrats and protected by democracies." Pinker, *supra.*

Or take comedy legend Richard Pryor, who pushed social conventions to illustrate an under-examined corner of the American experience. As his *New York Times* obituary described, Pryor "prowled the stage like a restless cat, dispensing what critics regarded as the most poignant and penetrating comedic view of African-American life ever afforded the American public." Mel Watkins, *Iconoclastic Comedian, Dies at 65*, N.Y. Times, Dec. 11, 2005, http://www.nytimes.com/2005/12/11/arts/11pryor.html. What made him so fresh and influential was that he combined the seemingly irreconcilable traits that make satirists successful: "He was volatile yet vulnerable, crass but sensitive, streetwise and cocky but somehow still diffident and anxious. And he could unleash an astonishing array of dramatic and comic skills to win acceptance and approval for a kind of stark humor." *Id.* And he did not think twice about offending those who heard his brand of comedy. Pryor's "often harsh observations and explicit language did offend some audiences. But he insistently presented characters with little or no

distortion. 'A lie is profanity,' he explained. 'A lie is the worst thing in the world. Art is the ability to tell the truth, especially about oneself.'" *Id.*

A society that protects its most sacred objects and beliefs from offense is one that will soon be ruled by naked emperors.

> Satire can stealthily challenge assumptions that are second nature to an audience by forcing them to see that those assumptions lead to consequences that everyone recognizes are absurd.
>
> That's why humor so often serves as an accelerant to social progress. Eighteenth-century wiseguys like Voltaire, Swift, and Johnson ridiculed the wars, oppressions, and cruel practices of their day. In the 1960s, comedians and artists portrayed racists as thick-witted Neanderthals and Vietnam hawks and nuclear cold warriors as amoral psychopaths. The Soviet Union and its satellites had a rich underground current of satire, as in the common definition of the two Cold War ideologies: "Capitalism is the exploitation of man by man; Communism is the exact opposite."
>
> We use barbed speech to undermine not just political dictators but the petty oppressors of everyday life: the tyrannical boss, the sanctimonious preacher, the blowhard at the bar, the neighborhood enforcer of stifling norms.

Pinker, *supra.*

Or, in the words of Salman Rushdie, who certainly knows something about offending people: "What is freedom of expression? Without the freedom to offend, it ceases to exist. Without the freedom to challenge, even to satirise all orthodoxies, including religious orthodoxies, it ceases to exist." Salman Rushdie, *A Pen Against the Sword; In Good Faith*, Newsweek, Feb. 12, 1990, at 52.

II. OFFENSIVE SPEECH FOSTERS SELF-EXPRESSION AND HELPS DEVELOP PERSONAL AUTONOMY

Expressing one's deepest thoughts, feelings, and values is vital to defining oneself as a unique and autonomous individual. Those who are restrained from self-expression are often called "repressed," and years of therapy is often the cure. *See, e.g.*, Dr. Michael Fenichel, *Repression: Anxiety Filter for the Ego*, http://www.fenichel.com/repression.shtml (last visited Feb. 16, 2015). As Justice Thurgood Marshall wrote in *Procunier v. Martinez*:

> The First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual's worth and dignity. Such restraint may be "the greatest displeasure and indignity to a free and knowing spirit that can be put upon him." J. Milton, *Aeropagitica*.

416 U.S. 396, 427-28 (1974) (Marshall, J., concurring) (citations omitted).

Even more than "mainstream" speech, offensive speech helps define us. Our commonalities do less to define our personalities than our eccentricities, offensive or otherwise. If speech is squelched by the government because it "might be offensive to any member of the public," then the government has closed off an important avenue for self-expression.

To give a rather obvious example, every October 11 the gay-rights organization Human Rights Campaign celebrates "National Coming Out Day" to "celebrate coming out as lesbian, gay, bisexual, transgender, queer (LGBTQ) or as an ally." Human Rights Campaign, National Coming Out Day, http://www.hrc.org/resources/entry/ national-coming-out-day. Coming out is seen as one of the most "basic tools" for combating discrimination and for asserting the deepest values and thoughts of the LGBT community. *Id.* Coming out is difficult precisely because the LGBT identity offends so many.

For the LGBT community, expressing one's sexual orientation is as important as practicing it. Coming out is often seen as the final piece of putting together and accepting one's personal identity, as well as contributing to social acceptance.[7] Although

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[7] One member of this Court recently recognized this dynamic. *See* Lou Chibarro Jr., *'Don't' Paint Me as Anti-Gay,' Says Scalia*, Wash. Blade, Feb. 13, 2015, http://www.washingtonblade.com/2015/02/13/dont-paint-anti-gay-says-scalia (Ginsburg, J., opining that the fact that "people who once hid what they were have announced to the world this is who I am" has contributed to societal change).

one could be a member of the LGBT community even before coming out, it is the *expression* of that membership that is a vitally important speech-act. In the words of Sir Ian McKellen, the acclaimed British actor who didn't come out until he was 49, "Anyone in public life who comes out, comes out primarily for themselves, and their life is immediately improved." Heather Saul, *Sir Ian McKellen on His Gravestone: Here Lies Gandalf. He Came Out*, The Independent, Feb. 22, 2014, http://goo.gl/GRUYyl. McKellen has even said that he'd like the fact that he came out to be printed on his gravestone. *Id.*

Similarly, for offensive people, the expression of offending opinions is a vitally important act that defines and solidifies their personalities. Like stigmatized sexual identities, when offensive opinions are not expressed they do not cease to exist, they merely fester, and the person hides a part of their true self.

Letting people define themselves through offensive expression also benefits others. It's good to know who the offensive people are and, thus, who you'd like to avoid. Lukianoff, *Unlearning Liberty*, at 29 ("Prohibitions on hateful speech do nothing to stop hate, but they let resentment simmer, and they also prevent you from knowing who the hateful people even are."). Exposed Nazis are better than hidden ones because most people would like to avoid associating with them. Similarly, if someone is offended by gun-rights supporters, pro-choice advocates, University of Texas fans, or, yes, Confederate sympathizers, allowing offensive people to speak can enhance the freedom of association.

This process of self-definition through offensiveness is put on full display in an old joke called "the Aristocrats." The joke is a comedic staple, perhaps going back to vaudeville times, and its longevity is based nearly entirely on its evolving offensiveness. Brian Logan, *The Verdict: In The Aristocrats, US Comics Tell 'The Dirtiest Joke in History.' What Do UK Comics Think of It?*, The Guardian, Sept. 1, 2005, http://goo.gl/RqyrHO. The joke has three simple parts: 1) a setup describing a family entering a talent agent's office saying they have an act he should see; 2) a description of the act in which the joke-teller invents the most offensive and obscene act that he/she can imagine; 3) when the shocked talent agent asks for the name of the act, the family says "The Aristocrats." The comedian is challenged to be as offensive as possible, with each new version one-upping the previous one. In the movie of the same name, co-produced by Cato's H.L. Mencken Fellow Penn Jillette, many famous comedians tell their version of the joke. *The Aristocrats* (ThinkFilm 2005). As each comedian tells the joke, the self-expressive aspect of offensiveness becomes clear.[8] As comedian George Carlin said about telling the joke, "we're different, we're in here, there's no rules wait until you hear this." *Id.*

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[8] Bob Saget—best known for starring as the beleaguered *pater familias* Danny Tanner in the ultra-saccharine family sitcom *Full House* (ABC 1987-95), as well as becoming the first host of *America's Funniest Home Videos* (ABC 1989-97)—tells the filthiest version of "The Aristocrats." Some people might be better off blissfully ignorant of Danny Tanner's potty mouth, but isn't America enriched by the full range of Saget's talent?

As offensive speakers struggle to define themselves, they invent new forms of offensiveness. *Amici* personally and professionally interact with many innovators in offensiveness, and indeed some people consider *amici* themselves to be innovative offenders. As long as humans are defining themselves by their offensiveness, there will always be new realms of offensiveness to uncover.

III. OFFENSIVE SPEECH IS UNDER ATTACK

A. OFFENSIVE SPEECH IS UNDER ATTACK THROUGHOUT THE WESTERN WORLD

The First Amendment provides much stronger protections for offensive speech than exists anywhere else in the world. "American protection of freedom of expression is generally stronger than that represented by an emerging multi-national consensus." Frederick Schauer, *The Exceptional First Amendment* (KSG Working Paper No. RWP05-021, 2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=668543. Throughout the Western world, speech-censoring laws have become increasingly common.

Shortly after the *Charlie Hebdo* massacre, the vile French comedian Dieudonné was arrested for a Facebook post that allegedly incited terrorism. Dieudonné's unquestionably offensive post seemed to champion the actions of Amedy Coulibaly, who took hostages in a kosher supermarket the day after the *Charlie Hebdo* attack. Laurence Dodds, *Who is Dieudonné, the French Comedian on Trial for Condoning the Charlie Hebdo Attacks?*, The Telegraph, Feb. 3, 2015, http://goo.gl/0otjFb. Now,

Dieudonné may well advocate the use of violence—*amici* have no quarrel with laws against incitement or true threats—yet here he is being prosecuted for merely expressing sympathy for the attackers.

Indeed, since the *Charlie Hebdo* tragedy, 37 people have been charged under the same law as Dieudonné. *Id.* This includes a one-year prison sentence for "a 22 year old man who posted a video mocking murdered policemen," and a 20-year-old man who, while unarmed himself, was jailed "for yelling 'long live the Kalashnikov' [referring to the AK-47] at police in a shopping centre." *Id.*

Entertainers have been increasingly under attack throughout the West. Some examples:

- In Canada, comedian Guy Earle was fined $15,000 for "offensive, irreverent, and inappropriate speech towards a lesbian audience member in a comedy club. Justice Jon Sigurdson of the Supreme Court of Canada emphasized that comedy clubs are not "zones of absolute immunity from human rights legislation." Tristan Hopper, *Court Upholds Decision to Fine Guy Earle $15K for Insulting Lorna Pardy*, Nat'l Post, June 23, 2013, http://goo.gl/oaI8o7.
- Polish pop star Dorota Rabczewska, or "Doda," was fined approximately $1,500 for blasphemy. In an interview, Doda said she "doubted the Christian holy book because it's hard to believe in something that was written by someone drunk on wine and smoking some herbs." Sara Dover, *Polish Superstar Doda*

Fined for Blasphemy, Int'l Business Times, Jan 17, 2012, http://goo.gl/3eTZAd.[9]

- In Germany, comedian Dieter Nuhr has been repeatedly investigated for hate speech for questioning whether Islam is a religion of peace. Barry Duke, *Comedian Is Accused of 'Hate Speech,'* The Free Thinker, Oct. 27, 2014, http://goo.gl/LWo64z.
- Beloved American songsmith Bob Dylan was charged with violating French laws for comparing Croatians to Nazis and the KKK in a *Rolling Stone* magazine interview. Charges were dropped because Dylan did not okay the publication of the interview in France. The magazine, however, is still under investigation. Marc Hogan, *Bob Dylan Cleared in French 'Hate Speech' Case*, Spin.com, Apr. 16, 2014, http://goo.gl/6SJboF.

This all goes without mentioning some of the higher-profile speech-prosecutions of recent years, like the pursuit of Mark Steyn in various Canadian "human rights" bodies for offending Muslims. *See, e.g.*, Mark Hemingway, *Idiot's Guide to Completely Idiotic Canadian 'Human Rights' Tribunals*, Nat'l Rev. Online, June 5, 2008, http://goo.gl/0zlUbl.[10]

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[9] Some people, such as Vladimir Putin, might be offended by the inclusion of Poland in a list of *Western* nations. Many more might be offended by any questioning of Poland's inclusion in such a list. Either way, historians and pundits should evaluate such questions, not government officials.

[10] For those not offended by citations to Wikipedia, see a thorough description of the Steyn denouement in *Human Rights Complaints Against Maclean's Magazine*, Wikipedia,

It is not just words that the "offended" hope to silence, but thoughts. As Ezra Levant, Canadian TV personality and former publisher of the *Western Standard*, said when questioned by the Alberta Human Rights and Citizenship Commission about his "intent" in republishing the famous Danish Mohammed cartoons:

> We published those cartoons for the intention and purpose of exercising our inalienable rights as freeborn Albertans to publish whatever the hell we want, no matter whatever the hell you think it's my right to do so for reasonable intentions, and it's my right to do so for extremely unreasonable purposes. I refuse to concede to you that what my political thoughts in my mind are or my heart are will determine whether or not an artifact is legal or illegal it's obvious that you're hunting for a thought crime.

What Was Your Intent?, YouTube.com, Jan. 12, 2008, https://www.youtube.com/watch?v=3iMNM1tef7g.

And sometimes no laws are necessary to stifle expression that, while itself of obvious scholarly value, may still offend. *See, e.g.*, Patricia Cohen, *Yale Press Bans Images of Muhammad in New Book*, N.Y. Times, Aug. 13, 2009, http://www.nytimes.com/2009/08/13/books/13book.html (important book about the controversial Danish cartoons, *The Cartoons That*

(continued...)

http://en.wikipedia.org/wiki/Human_rights_complaints_against_Maclean's_magazine (last visited Feb. 16, 2015).

Shook the World, was published without the reader being able to see what all the fuss was about).

While laws prohibiting blasphemy and other "offensive" speech should be First Amendment nonstarters, *amici* have good reason to be concerned that, without this Court's clear guidance, such laws will soon come to America. *See, e.g.*, Edward Schumacher-Matos, *Last Thoughts: NPR And The Balance Between Ethics And The Nation*, NPR.com, Feb. 6, 2015, http://goo.gl/h9kFDA (outgoing NPR ombudsman claims that *Charlie Hebdo* would not be protected under the First Amendment because it made "fun" of people's "prophets and gods" and constituted "hate speech"); *but see* Hans Bader, *NPR Wrongly Suggests Hate Speech and Blasphemy Are Unprotected by First Amendment*, Competitive Enterp. Inst., Feb. 11, 2015, http://goo.gl/Hrr5wA (summarizing this Court's precedent). Sometimes that guidance can come in unlikely places, such as a case about license plates.

B. OFFENSIVE SPEECH IS UNDER ATTACK ON COLLEGE CAMPUSES

The spirit of Galileo must have reeled when an editorial was published in the *Harvard Crimson* advocating for an end to the doctrine of academic freedom. Sandra Y.L. Korn, *The Doctrine of Academic Freedom*, Harvard Crimson, Feb. 18, 2014, http://goo.gl/udf3sn. According to the author, academic freedom should be replaced by "academic justice," a vague and ill-defined term that seems primarily based on not offending people. "When an academic community observes research promoting or

justifying oppression, it should ensure that this research doesn't continue." *Id.*[11]

Even more recently, after the University of Chicago issued a report addressing the freedom of expression on campus, the *Chicago Maroon*, the long-time student newspaper, took issue with the report's "commitment to free, robust, and uninhibited debate and deliberation among all members of the community." Editorial, *Land of the Free*, Chicago Maroon, Jan. 9, 2015, http://goo.gl/HU5DtT. That commitment to free speech, which closely resembles the First Amendment's commitment to free speech as articulated by this Court, was apparently too broad. "The University needs to clearly differentiate hate speech and *offensive speech*," wrote the editorial board, and "the University must maintain a consistent commitment to eradicating hate speech and harassment in campus discussion." *Id.* (emphasis added).

And just the week before this brief went to press, news broke that the University of Michigan—unlike Harvard and Chicago a state school—had launched a $16,000 campaign to eradicate "certain words and phrases that could be considered offensive." *University of Michigan Launches $16,000 Inclusive Language Campaign*, Aol.com, Feb. 10, 2015, http://www.aol.com/article/2015/02/10/these-words-are-offensive-says-university-of-michigan/21141245. Apparently the University of Maryland started a similar program in 2012. *Id.*

Torquemada blushes.

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[11] What constitutes "oppression" is unclear, but the rest of the article suggests it includes supporting Israel's right to exist.

Attacks on free speech on college campuses, in particular the freedom to offend, have risen to the level of an epidemic. Students are being taught that "real" freedom of speech necessitates censorship. See, generally, Lukianoff, *supra*. In an America run by most modern college administrators, Nazis would not be allowed to march in Skokie, *Nat'l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43 (1977), the Phelps family would not be allowed to protest funerals, *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), and the KKK would certainly not be allowed to have a rally, whether it incites violence or not, *Brandenburg v. Ohio*, 395 U.S. 444 (1969). In short, the America that many college campus administrators envision is a dystopian Pleasantville.

These speech-repressive campus regimes are not just harming students while on campus. Those students will become censorious voters, and "offensive" speech's days might be numbered. As Greg Lukianoff, the president of the Foundation for Individual Rights in Education has written:

> Administrators have been able to convince well-meaning students to accept outright censorship by creating the impression that freedom of speech is somehow the enemy of social progress. When students began leaving college with that lesson under their belts, it was only a matter of time before the cultivation of bad intellectual habits on campus started harming the dialogue of our entire country. The tactics and attitudes that shut down speech on campus are bleeding into larger society and wreaking havoc on the way we talk among ourselves.

Lukianoff, *Unlearning Liberty*, at 5 (2012).

Unfortunately, speech codes are popping up in colleges and universities, the very places where speech should be "uninhibited, robust, and wide open." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). And "uninhibited, robust, and wide open" debate "may well include vehement, caustic, and sometimes unpleasantly sharp attacks" on orthodoxies and received wisdoms. *Id.*

> Many of us have been conditioned to apologize for words that offend, when open debate is bound to create some offense. Indeed, it should happen. Being offended is what happens when you have your deepest beliefs challenged, and if you make it through four years of college without having your deepest beliefs challenged, you should ask for your money back.

Lukianoff, *Unlearning Liberty*, at 51.

Inevitably, the campus inquisition against offensive speech is affecting entertainment. Chris Rock has "stopped playing colleges" because of the students "social views and their willingness not to offend anybody." Frank Rich, *In Conversation: Chris Rock*, Vulture.com, Nov. 30, 2014, http://goo.gl/kcuZfV Says Rock:

> Kids raised on a culture of "We're not going to keep score in the game because we don't want anybody to lose." Or just ignoring race to a fault. You can't say "the black kid over there." No, it's the "guy with the red shoes." You can't even be offensive on your way to being inoffensive." [Playing on campuses] is not as much fun as it used to be. I remember talking

> to George Carlin before he died and him saying the exact same thing.

Id. Chris Rock's raunchy, edgy, discomfiting comedy picks up where the late, great, very funny and very offensive Richard Pryor left off.

Amici believe that if speech codes from campuses spill over into the rest of the country, and if this Court doesn't continue to take a firm stand in protecting offensive speech and understanding how offensive speech contributes to a free society, then all offensive entertainment could be threatened.

CONCLUSION

It would be offensive to the First Amendment for this Court allow Texas to tell us what is offensive. After all, one man's offensive speech is another's exercise of social commentary or personal expression. This Court should affirm the judgment below and let putative offenders be judged in the court of public opinion.

Respectfully submitted,

ROBERT CORN-REVERE
Davis Wright Tremaine LLP
1919 Penn. Ave., NW
Suite 800
Washington, DC 20006
(202) 973-4200
bobcornrevere@dwt.com

Counsel for Amicus *CBLDF*

ILYA SHAPIRO
Counsel of Record
Cato Institute
1000 Mass. Ave. NW
Washington, DC 20001
(202) 842-2000
ishapiro@cato.org

Counsel for Amici Curiae

February 17, 2015